87-971

Supreme Court, U.S.
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No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ANITA KAYE LOFTIN-BOGGS,

Petitioner,

v.

CITY OF MERIDIAN, MISSISSIPPI, JAMES L. GARRETT, SR., Individually and as City Engineer and Director of Public Works, and NEAL CARSON, Individually and as Assistant Director of Public Works,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit properly dismissed the appeal of petitioner because her *pro se* notice of appeal did not specifically refer to the order which had dismissed her sex discrimination claims.

2. Whether the United States Court of Appeals for the Fifth Circuit properly affirmed the lower court's dismissal of her slander claim on the ground that petitioner was a vortex public figure.

STATEMENT PURSUANT TO RULE 28.1 AND PARTIES TO THE PROCEEDINGS.

Kaye Loftin-Boggs was the appellant in the Court of Appeals. The appellees in the Court of Appeals were the City of Meridian, Mississippi, James L. Garrett, Sr., and Neal Carson as parties to the proceedings. The petitioner is Kaye Loftin-Boggs. The respondents are the City of Meridian, Mississippi, James L. Garrett, Sr., and Neal Carson.

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IN THE

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OCTOBER TERM, 1987

No. 87-_____

ANITA KAYE LOFTIN-BOGGS,

Petitioner,

v.

CITY OF MERIDIAN, MISSISSIPPI, JAMES L. GARRETT, SR., Individually and as City Engineer and Director of Public Works, and NEAL CARSON, Individually and as Assistant Director of Public Works,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the court of Appeals is unreported (App. 2.).[1]

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[1] The orders dismissing the Title VII claims of the petitioner for failure to specifically refer to that order and the ruling of the Court of Appeals on the petition for rehearing and suggestion of rehearing *en banc* were denied by memorandum orders without opinions.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1987. (App. 3). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, employed as a chemist with the City of Meridian, Mississippi, was terminated from her employment because of her sex and because she sought to challenge the unlawful actions of her supervisors, respondents Garrett and Carson. She sued respondents in the federal district court where she asserted her First and Fourteenth Amendment constitutional rights and a common law slander claim for which she sought damages and requested a trial by jury. In the same complaint, she asserted rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, for which she sought the statutory remedies provided. The district court conducted a trial for which the jury and non-jury causes were consolidated. At the conclusion of the trial, the judge by directed verdict dismissed petitioner's slander claim; the jury returned a verdict for the respondents on petitioner's constitutional claims. After taking the Title VII claims of sexual discrimination, sexual harassment and retaliation under advisement, the district court judge denied all relief. Post trial motions on the jury issues were denied by subsequent order.

Petitioner filed a notice of appeal, *pro se*, to the United States Court of Appeals for the Fifth Circuit, in which she referred only to the most recent order of the district court which had denied the post trial motions on the constitutional claims and the common law/slander claim. The court of appeals dismissed petitioner's claims under Title VII on the ground that she had failed to appeal those

issues when she only made specific refererce in her notice of appeal to the order of the district court denying her post trial motions on the jury claims.

In a later opinion, the court of appeals affirmed the directed verdict on the petitioner's common law slander claim, holding petitioner to be a limited—purpose public figure because she had sought press coverage for her grievances and the news media had granted that coverage because the controversy appeared newsworthy.

REASONS FOR GRANTING THE WRIT

Petitioner raises two distinct questions to this Court. The treatment both questions by the court of appeals was the application of form over substance to effectively deny the petitioner a full and complete opportunity for access to the courts. The court of appeals dismissed the appeal of petitioner with respect to her Title VII claims because in her *pro se* notice of appeal, she had referred only to the final order entered in her case by the district court. The court of appeals thus denied the opportunity for review of the merits of petitioner's case in violation of the established principles of this Court to avoid such prejudicial application of rules of procedure where the opposing party is not prejudiced and the effect of the notice of appeal can be easily ascertained.

Similarly, the court of appeals affirmed the directed verdict of the district court on petitioner's common law slander claim by holding petitioner to be a limited—purpose public figure because of publicity she initiated about her grievance *after* the underlying facts of her grievances had resulted in her being fired from her employment for unlawful reasons.

It is submitted that our system of justice encourages judicial review of the substance of the claims of an

aggrieved party and to deny that by relying on technicalities is the denial of a fundamental right.

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT PROPERLY DISMISSED THE APPEAL OF PETITIONER BECAUSE HER *PRO SE* NOTICE OF APPEAL DID NOT SPECIFICALLY REFER TO THE ORDER WHICH HAD DISMISSED HER SEX DISCRIMINATION CLAIMS

The complaint in this cause raised claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1983 and a pendent state law claim of slander. A jury trial was requested and granted for the 42 U.S.C. § 1983 and the slander claims. A consolidated trial was conducted with the jury hearing all of the evidence but being instructed and deciding only the Section 1983 and slander claims. The trial court reserved ruling on the Title VII claims and rendered an opinion subsequent to the completion of the trial. The following chronology was before the court of appeals when it dismissed petitioner's appeal of these issues:

1. On April 28, 1986, the district court clerk entered partial judgment dismissing the § 1983 and state law slander claims as a result of a jury verdict on the § 1983 claims and a directed verdict with regard to the slander claim.

2. On May 2, 1986, the district court issued its opinion holding that the plaintiff had failed to establish her Title VII claim.

3. On May 7, 1986, petitioner served her post trial motion seeking relief with regard to the § 1983 and slander jury claims.

4. On May 9, 1986, the district court entered the "final judgment" on its dismissal of the Title VII claims.

5. On June 7, 1986, the district court denied petitioner's post trial motion and the order was entered on June 17, 1986.

6. On July 16, 1986, petitioner filed the notice of appeal to the United States Court of Appeals for the Fifth Circuit. The notice of appeal was from the order of the court entered June 17, 1986.

7. The Fifth Circuit dismissed the Title VII claims because the petitioner had specified in her notice of appeal that she was appealing from the order denying the post trial motion and had not included her Title VII claims in her notice of appeal.

In *United States* v. *Ellicott*, 223 U.S. 524 (1912), a judgment was entered after which a motion for new trial was filed. Later a motion to amend the findings of fact was filed and an order was entered on that motion. Notice of appeal was filed from the judgment which denied the motion for new trial. In addition to finding that the appeal had been filed within the time required, the Court stated that the failure to specify in the notice of appeal the final judgment entered immediately after the trial was not fatal. 223 U.S. at 539. See also *State Farm Mutual Automobile Insurance Company* v. *Palmer*, 350 U.S. 944 (1956) which reversed the dismissal by the court of appeals of an appeal which had mistakenly specified in the notice a non-appealable order of the trial court.

That is precisely what happened in this case. Petitioner related in her notice of appeal the last order entered so that it would be apparent that her notice of appeal was from the last order of the district and was being filed in a timely fashion. She could not have noticed an appeal from the final judgment which was entered on May 8, 1986, because there was still pending before the district court the post trial motion with regard to the jury issues.

Petitioner thus could only file her notice of appeal within thirty days from the date which the court entered the order denying the post-trial motions even though her appeal related in part to issues finally decided by earlier judgment. To have done so earlier would have split her case and probably required her to proceed with an interlocutory appeal. This would have been undesirable as a matter of judicial efficiency and, it is submitted, is not encouraged by the rules of procedure.

It is only logical that once the final judgment was entered and post-trial motions were ruled on, the petitioner would notice her appeal on the last order entered. That she related her notice of appeal to that order should not penalize her by denying her the right to appeal the issues decided in the case. That she failed to specify in her notice of appeal the final judgment entered immediately after the trial was not fatal. *U.S.* v. *Ellicott*, 223 U.S. at 539.

The Fifth Circuit, as well as others, have adopted a policy of liberal construction of notices of appeal prevails in situations where the intent to appeal an unmentioned or mislabeled ruling is apparent and there is no prejudice to the adverse party. *C.A. May Marine Supply Co.* v. *Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir. 1981), citing with approval *Simpson* v. *Norwesco, Inc.*, 583 F.2d 1007, 1009 n.2. (8th Cir. 1978).[2] *C. A. May* stated the criteria: where the intent to appeal an unmentioned or mislabeled ruling is apparent; where there is no prejudice

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[2] See also *Gainey* v. *Brotherhood of Railway and Steamship Clerks, etc.*, 303 F.2d 716, 717-718 (3rd Cir. 1962); *Holz* v. *Smullan*, 277 F.2d 58, 61 (7th Cir. 1960); *Maryland Tuna Corp.* v. *MS Benares*, 429 F.2d 307, 318 (2nd Cir. 1970); *Peabody Coal Co.* v. *Local Union Nos. 1734, 1508, 1548, UMW*, 484 F.2d 78, 81 (6th Cir. 1973).

to the adverse party; or where the claims or issues are inextricably intwined. In addition to the liberality with which this Court treats this issue, a litigant proceeding *pro se*, should receive even greater deference. In this case, the court of appeals plainly failed to apply this Court's standards as well as its own.

The claims under the Title VII count and under the 42 U.S.C. § 1983 count were so entwined and interrelated that "each may be reviewed even though not referred to in the notice of appeal." *C.A. May Marine Supply, supra* at 1056.

The facts and proof at trial arose from the employment relationship between parties. Petitioner's Title VII claims and the causes alleged under the constitution tracked the same chronology of events: her complaints of sexual discrimination led her to invoke the grievance procedures of the City; the retaliation from the ruling on her grievance led to her discharge. Her claims under Title VII and under the Fourteenth Amendment to the Constitution were precisely from the same chronology of events. They were inextricably entwined and could not be reasonably separated so as to prosecute separately on appeal.

All proof was presented at the one trial to the jury and to the court. In the closing arguments before the jury on the Section 1983 claim, the respondents' attorney argued freely about the Title VII claims even though the jury would not decide them. The exhibits introduced from the personnel file of petitioner related both to the Section 1983 and Title VII claims. Petitioner made no complaints about violations of her constitutional rights during the grievance procedure, yet repeatedly during the closing argument before the jury, counsel for the defendants made references to her sexual discrimination/harassment

grievance. The issue of petitioner's exclusion from staff meetings because of her sex was a part of her Title VII claim and was an issue in the sexual discrimination grievance procedure but counsel addressed the issue during his argument to the jury which only considered the Section 1983 claims.

The respondents argued to the jury these matters of sexual discrimination, sexual harassment because all of the claims and issues and facts in the case were so meshed together, so "inextricably entwined," that it was impossible to separate them. The respondents can hardly claim that they were prejudiced nor were they without notice that the claims were so entwined as to give them any disadvantage. In fact, the respondents offered no evidence of prejudice nor did they argue that they were misled in any way.

In *Serzysko* v. *Chase Manhattan Bank*, 461 F.2d 699 (2nd Cir. 1972), the plaintiff had filed a series of post-trial motions. The motions were denied but the notices of appeal referred only to the orders denying those motions. The court held:

> The denial of a Rule 59 motion is normally appealable only in connection with the judgment to which it relates . . . . [H]owever, appellate courts may consider an appeal of only the denial of a Rule 59 motion as harmless error and treat the appeal as being the underlying judgment when such an appeal would be timely. . . .

461 F.2d at 701. The court noted the liberal construction to be accorded a *pro se* pleading and such construction should be applied here.

Where the petitioner's notice of appeal led to an interlocutory order and not the final order, the Fourth Circuit

Court of Appeals has rejected the contention that it lacks jurisdiction to consider the final judgment in the case.

> [T]his defect is not fatal where it can be reasonably inferred from the notice of appeal that the intent of the appellant was to appeal from the final judgment, if it also appears that the appellee has not been misled.

Lumbermen's Mutual Insurance Co. v. *Massachusetts Bonding and Ins. Co.*, 310 F.2d 627, 629 (4th Cir. 1962).

Petitioner was not a lawyer and could not afford a lawyer at the time she filed her appeal. She was barely ambulatory (due to the morning sickness caused by her pregnancy) at the time that she filed her appeal. Holding her to the same standards of expertise as a lawyer would be unjust and particularly when to do so would be contrary to the liberal interpretation this Court has placed on notices of appeals.

2. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT PROPERLY AFFIRMED THE LOWER COURT'S DISMISSAL OF HER SLANDER CLAIM ON THE GROUND THAT PETITIONER WAS A VORTEX PUBLIC FIGURE

After petitioner was discharged from her employment her supervisor, the city engineer, stated to the director of public works of another city that he had gotten rid of their chemist because she was incompetent. There was no doubt that petitioner was the object of his comment; nor was there any doubt about petitioner's competence. In fact, respondents took the position that petitioner did quit her employment because the position of chemist was abolished and she refused lesser employment. Petitioner had sued the City and Respondent Garrett because of this *per se* defamation. The trial court granted a directed verdict

on the slander claim on the ground that petitioner had thrust herself into the public through news articles appearing in the local newspaper.

The court of appeals affirmed the lower court's holding that petitioner was a vortex public figure, having met the "limited purpose public figure test" of *Trotter* v. *Jack Anderson Enterprises*, 818 F.2d 431 (5th Cir. 1987).[3] The lower courts based their decisions on seven newspaper stories appearing in a local newspaper from December 18, 1983, to February 8, 1985. Though neither opinion referred to an exhibit by number, it must be understood that the reference is to Exhibit No. D-53 which was marked for identification. Thus, the evidence relied on by both courts was never admitted into evidence.[4] Nevertheless, the newspaper articles do not support the third prong of the *Trotter* test nor the standard announced by this Court in *Dun and Bradstreet* v. *Greenmoss Builders*, 472 U.S. 749, 86 L.Ed.2d 593, 105 S.Ct. 2939 (1985). The defamation must be germane to the plaintiff's participation in the controversy in order for her to become a vortex public figure.

The Court of Appeals recognized that the statement forming the basis for Mrs. Loftin-Boggs' state law standard claim was uttered in May of 1984. Of the seven articles, two were published after that date. Those could

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[3] Though petitioner was a public employee, she was not a public figure. She was at a level of responsibility three tiers below the city manager who was the chief executive officer. See, e.g. *Connick* v. *Myers*, 461 U.S. 138 (1983).

[4] It is submitted that the courts could not properly rely on matters not entered into evidence. See, e.g. *U. S.* v. *Gurley*, 415 F.2d 144, 147 (5th Cir. 1969).

not serve as the basis for the Court's vortex public figure analysis of the lower courts.

The article dated March 13, 1984, did not mention petitioner nor make any reference whatsoever to any controversy which she might have had with the City of Meridian. Similarly, the article dated March 25, 1984, neither mentioned petitioner nor did it make any reference to her discharge from the City.

The article dated April 3, 1984, reported the accusation by petitioner that the City of Meridian was breaking the law and losing money by not requiring local firms to test their water before dumping it into the City sewer system. The only reference to sex discrimination was the statement that "Mrs. Boggs, who is reportedly filing a sex discrimination lawsuit against the City, said she 'was told the citizens of Meridian would not want us to approach these industries.'" This is not a statement by petitioner nor is it a quote of hers concerning her treatment as a female. Of course, petitioner did not file her lawsuit until January of 1985.

The December 18, 1983, article did not quote petitioner but rather the attorney who was representing her at that time. The article stated that her attorney was in the preliminary stages of investigation to determine whether a suit would be filed against the City of Meridian. The suit was not filed until over a year later.

All of these stories were written by either George Duncan or Billy Vaughn. Both reporters testified by deposition at the trial. Mr. Vaughn testified that he did not talk to petitioner until after she left her employment with the City. Mr. Duncan testified that he had no contact with petitioner while she was employed with the City and that the only contact he had with her was not personal in

nature or in description of a disagreement which petitioner might have had but rather "they were more technical in nature." In other words, his contract with her concerned her expertise as a chemist familiar with the wastewater treatment activities of the city.

The articles themselves nor the testimony of the reporters that actually wrote the articles fail to support the third prong of the test that the defamation be germane to petitioner's participation in the controversy. Moreover, none of the news articles contained any evidence that petitioner was attempting to influence the views of others on the matter which was the subject of the slander. The defamation was that she had been fired because she was incompetent. That has absolutely nothing to do with either her charge of discrimination or sexual harassment or any controversy that she might have had over mismanagement of the wastewater treatment of the City of Meridian. See *Hutchinson* v. *Proxmire*, 443 U.S. 111, 135 (1979).

The court of appeals suggested that after Loftin-Boggs initiated the lawsuit, she used the media to make sure that her point of view reached the public. See, *Slip. Op*, at pp. 7 and 8. (Ap. 7a) There is simply no evidence in the record that after her lawsuit was filed, which was substantially after the defamation, did she seek any immediate attention or have any contact whatsoever with the media.

CONCLUSION

Petitioner respectfully requests that the writ be granted and that this cause be summarily reversed and remanded to the United States Court of Appeals for the Fifth Circuit with instructions to review the sex discrimination claims raised under Title VII of the Civil Rights Act of 1964 by petitioner. Petitioner further requests that the writ be granted and the common law/slander claim of the petitioner be remanded to the district court for trial.

Respectfully submitted,

ANITA KAYE LOFTIN-BOGGS,
Petitioner

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APPENDIX

APPENDIX

1. Notice of Appeal 1a
2. Order of the Court of Appeals (July 10, 1987) 2a
3. Order of the Court of Appeals denying rehearing and suggestion for rehearing en banc (September 17, 1987 ..... 8a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CIVIL ACTION NO. E85-0011(L)

ANITA KAYE LOFTIN-BOGGS,

Plaintiff,

v.

CITY OF MERIDIAN, MISSISSIPPI, JAMES L. GARRETT, SR., Individually and as City Engineer and Director of Public Works, NEAL CARSON, Individually and as Assistant Director of Public Works,

Defendants.

FILED
July 16 1986
Clarence A. Pierce, Clerk

NOTICE OF APPEAL

Notice is hereby given that Anita Kaye Loftin-Boggs, plaintiff in the above entitled and numbered civil action, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Memorandum Opinion and Order dated June 17, 1986.

This 16th day of July 1986.

Respectfully submitted,

/s/_____
ANITA KAYE LOFTIN-BOGGS
Plaintiff

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4511
Summary Calendar

ANITA KAYE LOFTIN-BOGGS,
Plaintiff-Appellant,

v.

CITY OF MERIDIAN, MISSISSIPPI, JAMES L. GARRETT, SR., Individually and as City Engineer and Director of Public Works, NEAL CARSON, Individually and as Assistant Director of Public Works,
Defendants-Appellees.

Appeal From The United States District Court
For The Southern District of Mississippi
(CA-E85-0011(L))

(July 10, 1987)

Before REAVLEY, JOHNSON, and DAVIS, Circuit Judges.
JOHNSON, Circuit Judge:[1]

Anita Kaye Loftin-Boggs, a chemist formerly employed by the City of Meridian, Mississippi, sued the City and her supervisors for sex discrimination, civil rights violations, and state law slander. Having lost on all her claims, Loftin-Boggs

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

appealed only the district court's directed verdict on the slander claim. For the reasons outlined below, we affirm.

I. BACKGROUND

The City of Meridian hired Loftin-Boggs to work as a chemist in its Public Works Department in 1980. Loftin-Boggs worked under Neal Carson, the Assistant Director of Public Works, and James L. Garrett, the City Engineer and Director of Public Works. Loftin-Boggs had both personal and policy conflicts with Garrett. For example, Loftin-Boggs advocated strict enforcement of the City sewer ordinance to reduce the strain on the City's wastewater treatment plant and to produce revenue from testing. Garrett opposed stricter enforcement on the ground that it would burden small business. In 1983, Loftin-Boggs filed a grievance against Garrett, charging that Garrett used sexually abusive language toward her and excluded her from staff meetings. Garrett, in turn, accused Loftin-Boggs of falsifying time sheets, failing to complete water-pollution reports, and creating conflicts with other staff. City Manager Richard Burnett attempted to smooth over the differences and directed Garrett to include Loftin-Boggs in future staff meetings.

The Meridian water treatment system, which had been operating under a temporary permit, received a permanent permit in 1984. Arguing that, under the new permit, water testing could be carried out by a laboratory technician, the City Manager proposed that Loftin-Boggs' chemist position be downgraded and her salary reduced by $4,000. The City Council adopted this recommendation in December 1983, and Loftin-Boggs resigned, citing the downgrading, the same day.

In May 1984, Garrett, while at a professional convention, told R.C. Randall, a Commissioner of the City of Gulfport, Mississippi, "'We had to let a chemist go at the treatment plant because of incompetency.'" Record Vol. 5 at 502-03. This statement forms the basis for Loftin-Boggs' state law slander claim.

In January 1985, Loftin-Boggs sued the City of Meridian, Burnett, and Garrett for sex discrimination under Title VII of the Civil Rights Act of 1964, for violation of her civil rights under 42 U.S.C. §§ 1983 and 1985(3), and for state law slander. Loftin-Boggs later dropped the charges against Burnett and added Carson as a defendant. The district court entered a directed verdict against Loftin-Boggs on her slander claim, holding that Loftin-Boggs was a public figure and had not produced evidence of "actual malice" on Garrett's part. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). The jury found against Loftin-Boggs on her section 1983 claim. On April 24, 1986, the district court entered a "partial judgment" on the section 1983 and slander claims. Trial on the Title VII claims was to the district court, which issued an opinion on May 2, 1986, finding that Loftin-Boggs had failed to meet her burden of proof. On May 8, 1986, the trial court entered a final judgment on all the claims. Loftin-Boggs moved for judgment n.o.v. or a new trial on *the section 1983 and slander claims;* the district denied this motion in an order dated June 17, 1986. On July 16, 1986, Loftin-Boggs filed a notice of appeal "from the Memorandum Opinion and Order dated June 17, 1986." Since the June 17, 1986, order covered *only* the section 1983 and slander claims, this Court granted Meridian's motion to dismiss Loftin-Boggs' appeal of her Title VII claims. Loftin-Boggs has disclaimed any intention to appeal the jury's verdict on her section 1983 claims. Appellant's Brief at 2. Hence, only the pendent slander claim is at issue on this appeal.

II. DISCUSSION

Under both Mississippi and federal constitutional law, a "public figure" slander plaintiff must prove that a defendant spoke with "actual malice." *New York Times Co.*, 376 U.S. 254, 84 S. Ct. 710; *Trotter* v. *Jack Anderson Enterprises, Inc.*, No. 86-2542, slip op. at 4318 (5th Cir. June 5, 1987); *Ferguson* v. *Watkins*, 448 So. 2d 271 (Miss. 1984). The question of whether the plaintiff is a public figure is ordinarly reserved for the trial

court, and Loftin-Boggs and the City point to no considerations that would counsel a departure from that rule in the instant case. *Rosenblatt* v. *Baer*, 383 U.S. 75, 76, 88, 86 S. Ct. 669, 671, 677, 15 L. Ed. 2d 597 (1966); *Brewer* v. *Memphis Pub. Co., Inc.*, 626 F.2d 1238, 1247 and n.13 (5th Cir. 1980), *cert. denied*, 452 U.S. 962, 101 S. Ct. 3112, 69 L. Ed. 2d 973 (1981). Loftin-Boggs also does not attack the validity of the district court's conclusion that, if she is a public figure, she did not present enough evidence of actual malice to reach the jury. Our discussion, then, is limited to whether the district judge was correct, as a matter of law, in determinating that Loftin-Boggs was a public figure.

A "vortex public figure" or "limited purpose public figure" is a person who, while not a public figure for all purposes, has become so involved in a particular public controversy that it is fair to require him to meet the *New York Times* standard in suits over speech concerning that controversy. *Wolston* v. *Readers' Digest Ass'n, Inc.*, 443 U.S. 157, 164-65, 99 S. Ct. 2701, 2706, 61 L. Ed. 2d 450 (1979). This Court has recently adopted a test for limited-purpose public figures borrowed from the D.C. Circuit:

> (1) The controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution; (2) the plaintiff must have more than a trivial or tangential role in the controversy; and (3) the alleged defamation must be germane to the plaintiff's participation in the controversy.

Trotter, slip op. at 4320 (footnote omitted), *citing Tavoulareas* v. *Washington Post Co.*, No. 83-1604 (March 13, 1987) (en banc).

At trial, Loftin-Boggs called two reporters from the Meridian Star, William Vaughn and Georg Duncan, who testified that Loftin-Boggs met with them over a hundred times to provide them with information and documents. The trial records contains seven newspaper stories, dated December 18, 1983, to February 8, 1985, about Loftin-Boggs' sex discrimination

charges and her accusation that the City was mismanaging its wastewater system. Loftin-Boggs testified that she also talked to a local television reporter and gave reporters copies of her Equal Employment Opportunity Commission and court papers.

Applying the *Trotter* test, it appears that the citizens of Meridian had a legitimate public interest in knowing whether their Public Works Department was mismanaging its wastewater treatment program and discriminating against its female employees. Loftin-Boggs was at the center of that controversy because she had protested the decision not to strictly enforce the pollution ordinances, had been constructively discharged, and had brought a sex discrimination suit. Moreover, Loftin-Boggs' own evidence shows that she actively sought and obtained media access in order to tell "her side" of the controversy. Garrett's alleged statement to Randall concerned the same controversy; by claiming that Loftin-Boggs was fired for incompetence, Garrett denied that she was fired because of her sex or views. In sum, Loftin-Boggs meets the *Trotter* public-figure test. The facts of the instant case also bear a strong resemblance to those of *Ferguson* v. *Watkins*, in which the Mississippi Supreme Court held that doctors employed by a public hospital, who had engineered the controversial discharge of the hospital administrator, were "vortex public figures" under that state law doctrine. 448 So. 2d at 277-79.

Loftin-Boggs argues, however, that she entered the public arena involuntarily, as a result of wrong done to her by the City and the individual defendants, and only to defend herself. Loftin-Boggs points to *Whitten* v. *Commercial Dispatch Publishing Co., Inc.*, in which the Mississippi Supreme Court held that three men convicted of transporting cattle without proper disease testing could recover from a newspaper which falsely stated that the three were convicted of cattle theft. 487 So. 2d 843 (Miss. 1986). The Mississippi Supreme Court emphasized that the *Whitten* plaintiffs had done no more than plead guilty, in court, to misdemeanor charges, and that this involvement was "against their will." *Id.* at 845. By contrast, Loftin-Boggs

initiated a suit against Meridian and some of its officials and actively used the media to make sure that her point of view reached the public. It is true that Loftin-Boggs' suit was in turn sparked by the City's allegedly illegitimate act of discharging her. But the justice or injustice of Loftin-Boggs' position in the underlying controversy is not relevant to the question of whether it *was* a truly public controversy and whether Loftin-Boggs "thrust [herself] to the forefront" of that controversy "in order to influence the resolution of the issues involved." *Gertz* v. *Robert Welch*, 418 U.S. 323, 345, 94 S. Ct. 2997, 3009, 41 L. Ed. 2d 789 (1974). Nor is this a case where a libel defendant himself publicizes the plaintiff's affairs and then argues that this self-created publicity should allow him to invoke *New York Times*. *Hutchinson* v. *Proxmire*, 443 U.S. 111, 135, 99 S. Ct. 2675, 2688, 61 L. Ed. 2d 411 (1979). The record in the instant case indicates that Loftin-Boggs sought press coverage for her grievances and the news media—third parties—granted that coverage because the controversy appeard newsworthy. Loftin-Boggs therefore meets the limited-purpose public figure test.[2]

Because Loftin-Boggs does not dispute the district court's actual-malice ruling, and because the other issues decided at trial are not covered by this appeal, we AFFIRM the judgment of the district court.

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[2] The City and Garrett also argue that Garrett's statement cannot constitute slander because Garrett did not refer to Loftin-Boggs by name. Mississippi law clearly provides that a defamatory statement need not expressly mention the plaintiff, so long as the plaintiff can be reasonably identified as the subject of the statement. Krebs v. McNeal, 76 So. 2d 693, 701 (Miss. 1955). Loftin-Boggs was the only chemist employed at the Meridian wastewater treatment plant. Even if Randall did not know of Loftin-Boggs' identify at the time he heard Garrett's remark, Randall could certainly be expected to put two and two together if, for example, Loftin-Boggs ever applied for a job in Gulfport. Therefore, we reject this argument.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4511

ANITA KAYE LOFTIN-BOGGS,
Plaintiff-Appellant,

v.

CITY OF MERIDIAN, MISSISSIPPI,
JAMES L. GARRETT, SR.,ETC., ET AL.,
Defendants-Appellees.

Appeal From The United States District Court
For The Southern District of Mississippi

FILED
Sep 17 1987

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 10, 1987, 5 Cir., 198_, _____ F.2d ____)

(September 17, 1987)

Before REAVLEY, JOHNSON, and DAVIS, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge
9-8-87

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE